

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REFAEL KLEIN,

Plaintiff,

-against-

STACEY R. B. AICHER,

Defendant.

**DECLARATION OF
THOMAS S. D'ANTONIO**

Civil Action No.: 19-CV-9172

THOMAS S. D'ANTONIO, an attorney admitted to practice before the bar of this Court, declares that the following statements are true and correct:

1. I am a member of the firm of Ward Greenberg Heller & Reidy LLP, attorneys for defendant Stacey R. B. Aicher ("Ms. Aicher"). I have had primary responsibility for Ms. Aicher's defense since October 2019, and am personally familiar with the facts recited in this Affidavit.

2. I submit this Declaration in support of defendant Stacey Aicher's motion seeking, pursuant to Rule 70(e) of the Federal Rules of Civil Procedure, the Court's inherent powers to secure compliance with its Orders, and related authority, an Order finding plaintiff Klein in contempt of the Court's October 6, 2020 Order [Docket #88], for his failure to pay the sanctions as awarded by this Court in its July 29, 2020 Order [Docket # 77], by the extended deadline of October 20, 2020 that was established in the October 6 Order.

Background

3. The basis for the sanctions award was spelled out, in detail, in the Court's July 21 and 29 Orders [Docket # 74 and 77], and need not be repeated here.

4. Since July 29, I have made repeated and sustained efforts to secure the voluntary compliance of Mr. Klein, through various communications with his counsel William Kerr and numerous filings with this Court, in response to filings made by plaintiff Klein and/or his lawyer.

5. I have described my efforts in certain of these filings that are included on this Court's public docket, specifically including my letters dated September 3, September 25, and October 5, 2020. *See* Docket # 81, 83 and 87.

6. The outcome of these various filings included two separate Orders from this Court compelling plaintiff Klein to do what the Court expressly ordered him to do back on July 29—pay the sanctions owed to Ms. Aicher.

7. The first such Order, dated September 29, 2020, mandated payment by October 6. *See* Docket # 84. That Order further stressed to plaintiff Klein that his failure to comply “may result in the levying of additional sanctions against him.” *Id.*

8. In a last minute reprieve, the Court on October 6, 2020 extended the deadline for payment to October 20 (yesterday), and made plain that “[n]o further adjournments will be granted.” *See* Docket # 88.

9. I received no response from either plaintiff Klein's counsel, Mr. Kerr, or from plaintiff himself, in the intervening two weeks between October 6 and 20.¹

10. As a result, I wrote to Mr. Kerr, in an e-mail sent yesterday afternoon at 4:17 PM:

Bill—as you know, today is the last and final deadline for Mr. Klein's compliance with Judge Abrams's Orders, including

¹ Apparently, Mr. Klein communicated with the Southern District's *pro se* office, in a letter dated October 18 but just posted on the docket [Docket # 89] at 10:48 AM today. The letter seeks—as prior letters have sought—yet more time due to what he claims are ongoing difficulties with his lawyer, and alleged covid-related illnesses. (*Compare* Docket # 89 with Docket # 79, 85; *see also* Docket # 86). I believe defendant Aicher has compellingly replied to these submissions, and demonstrated their lack of merit, in my October 5 letter [Docket # 87], and in all events this Court's “last clear warning” issued after this exchange of correspondence. *See* Docket # 88.

particularly his obligation to pay the amount due Ms. Aicher, as assessed back in July 2020. *See* Docket 88. Having heard nothing further from you or from him, I reluctantly must conclude that he is intending to continue to disregard the Court's Orders. Assuming that indeed is the case, as a courtesy I am alerting you to the fact that we will be filing a motion for contempt, and for related relief, forthwith. That related relief, to be clear, will include the request for an additional assessment of fees and costs, compensating for the efforts we have spent, between July and now, chasing down a litigant who simply refuses to heed the Court's clear mandates.

(*See* Exhibit A).

Relief Sought

11. The first three branches of relief sought on this motion are related. Simply stated, it is our view, which we believe is a well-supported view, that plaintiff Klein continues to ignore, without legitimate justification, the Court's sanctions Orders.

12. The final and extended deadline for compliance set by this Court, in its October 6 Order, also has now come and gone.

13. Ms. Aicher therefore seeks a contempt finding against plaintiff Klein, and a clear directive setting forth his obligation to pay the \$74,160 sum previously awarded forthwith.

14. We have proposed that payment be made to the Clerk, as that perhaps would provide the easiest method for the Court to monitor compliance, but payment could also be directed to be made directly to Ms. Aicher or to our law firm, as attorneys for Ms. Aicher, if the Court in its discretion deems that to be appropriate.

15. In addition, we seek that the Court embody the sanctions award in a money Judgment. That would permit Ms. Aicher, if payment is not made, to record the obligation of Mr. Klein as a matter of public record, and otherwise independently pursue enforcement remedies.

16. In addition, between July 29 and October 19, 2020, on Ms. Aicher's behalf we have incurred additional fees totaling \$9,992, in connection with efforts to secure plaintiff Klein's

compliance, including as noted various communications with plaintiff Klein's counsel and several filings that were necessitated by plaintiff's stubborn noncompliance.² The detail with respect to this time and corresponding time value is reflected in the attached prebilling statement, submitted as Exhibit B.

17. In addition to this recorded time, yesterday I spent .2 hours checking the docket and composing my e-mail to Mr. Kerr (included as Exhibit A), and today I have spent a total of 3.1 hours drafting this motion. The time value of these 3.3 hours, at the discounted \$360 rate agreed to with Ms. Aicher, is \$1,188.

18. In the aggregate, therefore, defendant Stacey Aicher requests that a supplemental fee sanction in the amount of \$11,180, plus an express mail disbursement of \$52.79,³ be assessed against Refael Klein.

19. In total, therefore, we seek a supplemental sanctions award, against plaintiff Klein, of ***\$11,232.79***.

² We have excluded from this total any fees related to plaintiff Klein's appeal from this Court's July 21 Order, which dismissed plaintiff's Complaint and awarded sanctions. While we very much consider such an appeal to be yet another frivolous litigation act, we understand the proper procedure to address the frivolous appeal would include an application for additional sanctions, directed to the Circuit Court of Appeals. That application would be filed only in the event plaintiff actually perfects his appeal, which at this point appears highly doubtful because he is now in default with the Circuit Court, having failed to perfect by the October 14, 2020 deadline set by the Second Circuit. The Second Circuit's October 15 Order therefore has conditionally dismissed plaintiff Klein's appeal, unless it is perfected by October 28, 2020. As of today, plaintiff has yet even to propose the content of an appellate Appendix.

³ This out of pocket charge reflects the cost of an express mail package to the Court, as required by the rules, with copies of the Rule 11 and Rule 12 motions. While the package was sent, overnight, on June 4, 2020, it was not recorded until the FedEx statement for June was processed, on August 12. *See* Exhibit B at page 5. August 12, of course, was after I submitted the requested fee accounting, with my Affidavit that was sworn to July 27, 2020 [Docket # 76].

20. In the event such additional sanctions are awarded, we would respectfully request that they, too, be embodied in a money Judgment from the Court, for the reasons discussed in paragraph 15, above.

21. The final branches of the motion seek such additional sanctions against plaintiff, and such additional relief, as this Court in its sound discretion thinks appropriate. We do note that plaintiff, by dint of the September 29 Order issued by this Court [Docket # 84], without question has “fair warning” as to the consequences of his noncompliance.

22. We believe he should be held appropriately accountable, and of course this Court is in the proper position to assess, in its discretion, how that best can be done.

Dated: October 21, 2020

s/ Thomas S. D’Antonio
Thomas S. D’Antonio (TSD-2927)

EXHIBIT A

From: D'Antonio, Tom
Sent: Tuesday, October 20, 2020 4:17 PM
To: 'wkerr kerrllp.com' <wkerr@kerrllp.com>
Subject: Refael Klein

Bill—as you know, today is the last and final deadline for Mr. Klein's compliance with Judge Abrams's Orders, including particularly his obligation to pay the amount due Ms. Aicher, as assessed back in July 2020. *See* Docket 88. Having heard nothing further from you or from him, I reluctantly must conclude that he is intending to continue to disregard the Court's Orders. Assuming that indeed is the case, as a courtesy I am alerting you to the fact that we will be filing a motion for contempt, and for related relief, forthwith. That related relief, to be clear, will include the request for an additional assessment of fees and costs, compensating for the efforts we have spent, between July and now, chasing down a litigant who simply refuses to heed the Court's clear mandates.

Thomas S. D'Antonio | WARD GREENBERG HELLER & REIDY LLP

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WARDGREENBERG

NEW YORK PENNSYLVANIA NEW JERSEY DELAWARE

EXHIBIT B

10/21/2020

Ward Greenberg Heller & Reidy LLP
WGHR Pre-bill Worksheet

Full Name: AICHER, STACEY - REFALE KLEIN TO PAY BIL

**** RAFAEL KLEIN COURT ORDERED TO PAY BILL ****
31 Nottingham Road
Rockville Center, NY

Bills to: Rafael Klein Paying bill

Phone Home 516-996-8106

Fax
Other

In Ref To Klein, Refael
v. Stacey R.B. Aicher

Sup Attorney TSD

State

Balance in Trust Account: \$0.00

Matter ID 1838-0001

Engagement Type HLC

Last Bill 8/5/2020

Date Timekeeper

ID	Activity	Rate	Hours	Amount
8/21/2020 596552	TSD BW Billable Work E-mail exchanges with M. Spakowski and telephone conference regarding appeal, stay options.	\$360.00	0.20	72.00
596616	MFS BW Billable Work Review plaintiff's notice of appeal and confer via telephone with T. D'Antonio regarding whether appeal stays the enforcement of the judgment and whether plaintiff is required to post bond.	\$280.00	0.20	56.00
8/24/2020 612521	MFS BW Billable Work Research whether plaintiff's appeal stays the enforcement of the judgment, whether plaintiff is required to post bond, appeal bonds under the federal rules, supersedeas bonds under the federal rules, when judgment enforcement is stayed, how to enforce a judgment, New York judgment enforcement procedures, writs of execution, CPLR rules regarding judgment enforcement, and enforcement of a federal judgment (5.3). Summarize research and email summary to T. D'Antonio (1.4).	\$280.00	6.70	1,876.00
8/25/2020 598129	MFS BW Billable Work Confer with T. D'Antonio regarding whether plaintiff's appeal stays the enforcement of the judgment and whether plaintiff is required to post bond.	\$280.00	0.20	56.00

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8/31/2020 598846	TSD BW Billable Work Review and forward letter from Klein to Court.	\$360.00	0.20	72.00
9/1/2020 599270	TSD BW Billable Work Discuss letter response to Klein request with M. Spakowski.	\$360.00	0.20	72.00
9/2/2020 599468	TSD BW Billable Work Review M. Spakowski memo, arrange call for 9/3.	\$360.00	0.10	36.00
600052	MFS BW Billable Work Research federal rules and case law regarding stay of proceedings, stay of enforcement of judgment, ability of district court to require bond during stay, ability of district court to waive bond requirement, and factors court considers when deciding to waive bond, for letter to court opposing Klein's request for stay. Summarize research and email T. D'Antonio.	\$280.00	1.30	364.00
9/3/2020 599927	TSD BW Billable Work Telephone call with M. Spakowski. Draft and finalize letter response to Klein letter to Judge Abrams.	\$360.00	1.40	504.00
600053	MFS BW Billable Work Draft letter to district court opposing Klein's request for stay of proceedings or stay of enforcement of judgment, conducting supplemental on supersedeas bond requirement and waiver factors when needed (2). Email draft letter to T. D'Antonio for review. Confer with T. D'Antonio via telephone regarding draft letter opposing Klein's stay request (.1). Review T. D'Antonio edits to letter to district court, proofread and revise letter, and finalize letter for filing (.7). Email T. D'Antonio final letter to file.	\$280.00	2.80	784.00
9/9/2020 601777	MFS BW Billable Work Confer via telephone with T. D'Antonio regarding order on Klein's letter and review court's order and clerk's judgment.	\$280.00	0.20	56.00
9/10/2020 612520	TSD BW Billable Work E-mail to W. Kerr regarding client failure to comply with Court's Order and next steps.	\$360.00	0.10	36.00
9/16/2020 603508	TSD BW Billable Work E-mail exchange and telephone conference with W. Kerr regarding joint appendix, prior request for response regarding plaintiff's noncompliance with sanctions order and timeline for response. E-mail to M. Spakowski regarding same.	\$360.00	0.70	252.00

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9/17/2020	MFS		\$280.00	3.20	896.00
603631	BW	Billable Work			
		Research standards for contempt, contempt as a result of failure to pay sanctions, need for date certain in sanctions order, alternatives to contempt, and examples where failure to pay fees or sanctions resulted in contempt.			
9/18/2020	MFS		\$280.00	0.70	196.00
603638	BW	Billable Work			
		Research standards for contempt, contempt as a result of failure to pay sanctions, need for date certain in sanctions order, alternatives to contempt, and examples where failure to pay fees or sanctions resulted in contempt.			
9/20/2020	TSD		\$360.00	0.20	72.00
603515	BW	Billable Work			
		E-mail to W. Kerr regarding need for response, as promised, regarding Second Circuit appendix and Klein's response to Court's orders.			
	MFS		\$280.00	0.10	28.00
603640	BW	Billable Work			
		Review email from T. D'Antonio to W. Kerr regarding documents in appendix, Klein's failure to pay, and possible contempt.			
9/22/2020	TSD		\$360.00	0.10	36.00
604521	BW	Billable Work			
		E-mail exchange with M. Spakowski regarding contempt motion and confirm 9/23 call regarding same.			
	MFS		\$280.00	3.70	1,036.00
605264	BW	Billable Work			
		Research request for date certain for payment of sanctions, contempt motion for failure to pay sanctions, sanctions on appeal, ability to obtain attorney's fees for appeal, sanctions under federal appellate rules, standards for sanctions on appeal, definition of frivolous appeal, ability of court to impose sanctions pursuant to inherent power or other statute, and examples of cases where sanctions/fees were awarded to appellee for frivolous appeal.			
9/23/2020	TSD		\$360.00	0.30	108.00
605758	BW	Billable Work			
		E-mail exchange and telephone conference with M. Spakowski regarding Klein's failure to satisfy court order obligations and options for proceeding.			
	MFS		\$280.00	2.90	812.00
605265	BW	Billable Work			
		Continue research regarding request for date certain for payment of sanctions, contempt motion for failure to pay sanctions, sanctions on appeal, ability to obtain attorney's fees for appeal, sanctions under federal appellate rules, standards for sanctions on appeal, definition of frivolous appeal, ability of court to impose sanctions pursuant to inherent power or other statute, and examples of cases where sanctions/fees were awarded to appellee for frivolous appeal (2.5). Confer with T. D'Antonio via telephone regarding next steps, including letter motion to court			

requesting date certain for payment of sanctions or post of supersedeas bond, contempt motion, and appendix for appeal (.4).

9/24/2020	MFS		\$280.00	2.40	672.00
605268	BW	Billable Work			
	Review case docket and emails from T. D'Antonio to W. Kerr regarding payment of sanctions, contact with R. Klein, appendix, and involvement of court for contempt and payment of sanctions. Draft letter motion to Judge Abrams regarding request to set deadline for payment of sanctions, alternate requirement to post supersedeas bond, and future contempt motion. Conduct research regarding same as needed.				
9/25/2020	TSD		\$360.00	0.90	324.00
605733	BW	Billable Work			
	E-mail exchange with M. Spakowski. Finalize letter and file with Judge Abrams.				
	MFS		\$280.00	0.40	112.00
605270	BW	Billable Work			
	Review T. D'Antonio revisions and proofread and finalize letter to Judge Abrams.				
9/29/2020	TSD		\$360.00	0.20	72.00
606400	BW	Billable Work			
	E-mail exchange with M. Spakowski and S. Aicher regarding Order compelling Klein to pay by 10/6.				
	TSD		\$360.00	0.30	108.00
606403	BW	Billable Work			
	E-mail exchange and telephone conference with M. Spakowski regarding Klein's failure to satisfy court order obligations and options for proceeding.				
	MFS		\$280.00	0.30	84.00
606676	BW	Billable Work			
	Review Order on letter motion requesting deadline for payment of sanctions. Exchange emails with T. D'Antonio and S. Aicher regarding same.				
10/1/2020	TSD		\$360.00	0.10	36.00
609212	BW	Billable Work			
	E-mail to W. Kerr regarding failure to respond to status inquiry.				
10/3/2020	TSD		\$360.00	0.10	36.00
608529	BW	Billable Work			
	Review Kerr letter.				
10/4/2020	TSD		\$360.00	1.70	612.00
608523	BW	Billable Work			
	Draft letter in response to Kerr letter.				

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WGHR Pre-bill Worksheet

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607366	MFS BW Billable Work Review, read, and analyze October 2 letter filed by Kerr/Klein. Communicate with T. D'Antonio regarding same.	\$280.00	0.30	84.00
10/5/2020 608518	TSD BW Billable Work Finalize and file reply to 10/2 Kerr letter.	\$360.00	0.40	144.00
609051	MFS BW Billable Work Review, proofread, and edit letter from T. D'Antonio to the Court in response to Kerr/Klein's October 2 letter. Communicate with T. D'Antonio regarding same.	\$280.00	0.70	196.00
10/6/2020 608510	TSD BW Billable Work Review and forward Order compelling Klein payment by 10/20. E-mail to S. Aicher regarding same.	\$360.00	0.10	36.00
609055	MFS BW Billable Work Review Order on recent letter motions regarding deadline for payment of sanctions award and communicate with T. D'Antonio and S. Aicher regarding same.	\$280.00	0.20	56.00
TOTAL Billable Fees			33.60	\$9,992.00
Date ID	Activity	Price	Quantity	Amount
8/12/2020 593543	E107 Payment to Federal Express for delivery to Courier US District on 6/4/20.			52.79
TOTAL Billable Costs				\$52.79
Total of Fees (Time Charges)				\$9,992.00
Total of Costs (Expense Charges)				\$52.79
Total new charges				\$10,044.79

Timekeeper Summary

Timekeeper	Rate	Hours	Charges
TSD	\$360.00	7.30	\$2,628.00
MFS	\$280.00	26.30	\$7,364.00

10/21/2020

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WGHR Pre-bill Worksheet

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Previous Balance	\$74,160.00
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Outstanding Accounts Receivable

8/5/2020	88744	\$74,160.00
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Total New Balance	\$84,204.79
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